Filed 3/2/09 P. v. Brittain CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LANCE DENE BRITTAIN et al., Defendants and Appellants.	D050186 (Super. Ct. No. SCD187149)

APPEALS from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

A jury convicted Lance Dene Brittain and Larry Ray Phillips of first degree murder (Pen. Code, § 187, subd. (a)), robbery (*id*., § 211) and attempted murder (*id*., §§ 664, 187, subd. (a), 189). The jury also convicted Brittain of unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a)), and Phillips of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)).[1]

1 All statutory references are to the Penal Code unless otherwise indicated.

Brittain and Phillips appeal. Brittain contends that his convictions must be reversed because: (i) there was insufficient evidence to support his conviction for attempted murder; (ii) the trial court's instructions regarding the attempted murder were erroneous; (iii) the trial court erred in declining to sever Brittain's trial from Phillips's trial; (iv) the trial court erred in declining to instruct the jury that Phillips's out-of-court statements implicating Brittain should be viewed with caution; and (v) the trial court abused its discretion by allowing irrelevant, prejudicial testimony to be introduced at trial.

Phillips argues that his convictions must be reversed because the trial court: (i) erroneously refused to sever the murder trial from the attempted murder trial; and (ii) abused its discretion by refusing to admit evidence of inconsistent statements made by various prosecution witnesses.

As discussed below, we find the contentions raised by Brittain and Phillips to be without merit and affirm.

FACTS

1. *The Abramovitz Murder*

On July 13, 2004, Brittain and Phillips beat Stewart Abramovitz to death in the office of A&R Motors at 7364 El Cajon Boulevard. In the process of beating Abramovitz, Brittain and Phillips obtained the PIN number for Abramovitz's ATM card. Brittain then used the ATM card to make repeated withdrawals from an ATM at the Sycuan Casino.

An ATM camera took pictures of Brittain making the withdrawals, and those pictures were later broadcast on a *Crime Stoppers* television segment and on San Diego County Crime Stoppers Web site, leading to Brittain's identification by members of the public. DNA matching Brittain's genetic profile and DNA consistent with Phillips's genetic profile were found in a blood stain in Abramovitz's office.

2. *The Hirt Attempted Murder*

Ten days after the Abramovitz murder, at around 3:00 a.m., Brittain and Phillips drove to the home of Deborah Hirt. After using methamphetamine provided by Hirt, the three drove toward Jamul, with Brittain leading in a van and Hirt and Phillips following in Hirt's car.

Brittain pulled over on Highway 94 and stopped; Hirt, confused about what was going on, parked next to Brittain's van. Phillips then got out of the car and, moments later, Hirt felt a gunshot in the back of her neck. Hirt, who had remained in the driver's seat with the engine running, was able to drive away to a nearby 7-Eleven to seek assistance. She subsequently informed paramedics that Brittain and Phillips had shot her. Hirt was taken to the hospital where a surgeon repaired her jugular vein, saving her life. As a result of the wound, Hirt's face was partially paralyzed.

3. *Escape and Capture*

In August 2004, after viewing the *Crime Stoppers* television segment, Brittain decided to leave town. Brittain stole a car from the parking lot of In Cahoots bar in Mission Valley, and fled to Colorado with his fiancée, Kerlinda Ramirez. On August 26, 2004, Brittain was arrested in Commerce City, Colorado, after a police officer stopped

the couple in the stolen car. During the stop, Ramirez told the police officer about the car theft and related to him Brittain's statements indicating his complicity in the Abramovitz murder.

On November 7, Phillips was stopped for a traffic violation and arrested in Norwood, Colorado. After being transported to a San Diego jail, Phillips told an inmate about the Abramovitz murder and the Hirt shooting. While in jail, Brittain attempted to send a note to Phillips. The note stated: "I will take our cases. I'll take a deal for life without. You call me as a witness and I'll get on the stand and say I did them."

DISCUSSION

I.

Brittain's Appeal[2]

Brittain raises numerous challenges to his convictions. We address each separately below.

A. *There Is Sufficient Evidence to Sustain the Attempted Murder Conviction*

Brittain contends that there was insufficient evidence to sustain his conviction for attempted murder with respect to the Hirt shooting. We disagree.

In evaluating a challenge to the evidence supporting a jury's verdict, "we review the whole record in the light most favorable to the judgment below to determine whether

---

2 Brittain and Phillips explicitly join in each other's appellate arguments. Thus, while we address each argument with reference to the defendant advancing the argument, we deem each argument to be advanced by both defendants to the extent applicable. (See, e.g., *People v. Smith* (1970) 4 Cal.App.3d 41, 44.)

it discloses substantial evidence — that is, evidence that is reasonable, credible and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66.) Reversal is not warranted "unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*).) In performing our review of the record, we are limited by the fact that it "'"is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends."'" (*People v. Smith* (2005) 37 Cal.4th 733, 739.) We are, thus, not permitted "to reweigh the evidence or redetermine issues of credibility" (*People v. Martinez* (2003) 113 Cal.App.4th 400, 412) and even the "uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.)

Under the prosecution's theory of the case, Phillips (not Brittain) shot Hirt. According to the prosecution, Brittain was guilty of attempted murder through the legal doctrines of aiding and abetting and conspiracy liability. In essence, the prosecution attempted to show that Brittain either knowingly aided Phillips's effort to kill Hirt and/or conspired with Phillips to commit the near fatal shooting. (See *People v. Durham* (1969) 70 Cal.2d 171, 180, fn. 7 [recognizing that the prosecution often "seeks to show through the existence of conspiracy that a defendant who was not the direct perpetrator of the criminal offense charged aided and abetted in its commission"].)

Brittain contends that his conviction for attempted murder cannot be sustained on either a conspiracy or aiding and abetting theory because the mere fact that Brittain was present during the shooting is insufficient to infer that he had the requisite mental state for legal culpability — a specific intent to kill Hirt. After reviewing the record, we believe there is substantial evidence to support the jury's attempted murder verdict, most obviously on an aiding and abetting theory. (See *Bolin*, *supra*, 18 Cal.4th at p. 331 [reversal for insufficient evidence is not warranted "unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support" the conviction].)

"Whether one has aided and abetted in the commission of a crime is a question of fact for the jury to determine from the totality of the circumstances proved." (*People v. George* (1968) 259 Cal.App.2d 424, 429 (*George*).) Factors that the jury may consider in making this determination "include companionship and the conduct of the accused before and after the offense." (*Ibid.*) Further, while Brittain is correct that "mere presence at the scene of an offense is not sufficient in itself to sustain a conviction, it is a circumstance which will tend to support a finding that an accused was" complicit as a principal in the charged crime. (See *People v. Laster* (1971) 18 Cal.App.3d 381, 388-389 (*Laster*) [affirming conviction against similar challenge where one of three codefendants claimed his mere presence at scene was insufficient to show a shared intent with direct perpetrator]; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094 ["Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense"].)

The totality of the circumstances demonstrated by the prosecution's evidence in the instant case provided sufficient support for the jury to find that Brittain aided and abetted the attempted murder. The most powerful inculpatory circumstance was Brittain's active participation in the events leading up to the shooting. Brittain arrived with Phillips at Hirt's house at the unusual hour of 3:00 in the morning. Brittain was present when Phillips then asked Hirt for her gun, and when Phillips took out his own gun — presumably the murder weapon.

When Hirt pointed out that contrary to the purported reason for their visit, Phillips did not appear to need a ride (because Brittain had a car), *Brittain* stated that his van was not working properly and they were going to drop it off with a friend to get it fixed (an apparently false story). Brittain then led Phillips and Hirt to the scene of the shooting and, shortly after speaking with Phillips at a brief stop, parked in a place (and in a manner) well suited for the shooting that resulted. This evidence strongly implicated Brittain in the shooting.

In addition, to the extent there was a question — as Brittain suggests — as to whether Brittain had knowledge of Phillips's criminal intentions toward Hirt, the jury could consider the evidence of Brittain's participation in the Abramovitz homicide, which supported an inference that Brittain and Phillips were partners in crime. (Cf. *George*, *supra*, 259 Cal.App.2d at p. 429 [recognizing that the jury may consider the "conduct of the accused before . . . the offense" in ascertaining complicity]; see part II.A., *post* [discussing relevance of evidence of criminal partnership].)

Various postoffense statements also supported the jury's conclusion that Brittain aided and abetted the attempted murder. After Hirt escaped to a nearby 7-Eleven, she told the paramedics that "it was Larry Phillips and Lance Brittain that had shot [her]"; Hirt also mentioned that they had driven past her after the shooting. Prison inmate Timothy Griffin testified that Phillips told him "he had committed a murder; they had killed an older guy, and that *they* had shot a lady in the back of the head." (Italics added.)

With respect to Brittain's conduct after the offense, Brittain's flight supported an inference of guilt. In addition, the police later recovered a .22-caliber bullet from Brittain's backpack and this was the same type of bullet that was recovered from Hirt's dashboard after the shooting.

In light of the totality of the evidence described above, a rational jury could reasonably conclude that Brittain was not an unknowing participant in the Hirt shooting, but rather actively aided and abetted that shooting and consequently was guilty of attempted murder. (*Laster, supra,* 18 Cal.App.3d at p. 389 [holding in similar context that the intent of a codefendant "may be inferred from all of the circumstances" and "[t]he finding implicit in the verdict of the jury cannot be set aside by this court if it is sustained by a reasonable inference"].)

B. *The Trial Court's Instructions Regarding Potential Conspiracy Liability for the Attempted Murder Were Not Erroneous*

Brittain contends that even if there was sufficient evidence to support his conviction for attempted murder, we must still reverse the conviction because the trial court's instructions regarding the offense were partially erroneous. We disagree.

In a colloquy regarding the appropriate jury instructions, the trial court ruled that the jury should be instructed with CALCRIM No. 416, a general instruction defining a conspiracy and stating the legal principle that "[a] member of a conspiracy is criminally responsible for the acts or statements of any other member of the conspiracy done to help accomplish the goal of the conspiracy." (CALCRIM No. 416.) The trial court asked the prosecutor to provide a final instruction reflecting its ruling.

The final instruction drafted by the prosecutor with respect to the Hirt shooting stated that to prove that either defendant was a member of a conspiracy, the prosecution had to prove that "[a] defendant intended to agree and did agree with the other defendant to commit attempt[ed] murder or robbery," that the defendants intended that one of them "would commit robbery or attempt[ed] murder" and one of the defendants committed at least one overt act "to accomplish the robbery or attempt[ed] murder."[3]

Brittain contends that the instruction was erroneous because it references attempted murder (as opposed to murder) as the object of the conspiracy. Brittain asserts that "there is no such crime as conspiracy to commit attempted murder." (See *People v. Iniguez* (2002) 96 Cal.App.4th 75 (*Iniguez*) [reversing guilty plea to conspiracy to

---

3 Brittain's statement that "[b]oth trial counsel objected to the instruction" is technically correct, but somewhat misleading. Counsel objected to the instruction on grounds that are distinct from the challenge now raised on appeal: that the instruction, in concert with an aiding and abetting instruction, could result in a nonunanimous jury and that the (original) conspiracy instruction was confusing. Despite the failure to object *on the grounds now raised on appeal*, we reach the question of the instruction's propriety because the trial court has an independent duty to provide the jury with legally correct instructions. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1131 (*Guiton*).)

commit attempted murder on ground that specific intent required for attempted murder and conspiracy are inconsistent].)[4]

Brittain argues that, in light of the jury's general verdict, there is no way to determine if the jury relied on the (assertedly) faulty conspiracy instruction or the (concededly) proper aiding and abetting instruction in convicting Brittain of attempted murder. In such circumstances, Brittain argues, reversal is required. (See *Guiton*, *supra*, 4 Cal.4th at p. 1130 [recognizing that where appellate court cannot determine if jury relied on improper legal theory to convict, reversal is generally required].) In analyzing this contention, we must initially examine whether, in fact, the trial court's conspiracy instruction was erroneous.

When considering a challenge to a jury instruction, "'we do not view the instruction in artificial isolation but rather in the context of the overall charge.'" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1075.) For ambiguous instructions, "'the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction.'" (*Ibid.*) We focus our analysis on "the meaning that the instructions *communicated to the jury*. If that meaning was not objectionable, the instructions cannot be deemed erroneous." (*People v. Benson* (1990) 52 Cal.3d 754, 801 (*Benson*).)

---

4 In *Iniguez, supra,* 96 Cal.App.4th 75, the court ruled that due to the "inconsistency in required mental states" between an attempt crime and the conspiracy at issue, "conspiracy to commit attempted murder" is "a conclusive legal falsehood." (*Id.* at pp. 77, 79.) Consequently, the court in *Iniguez* set aside a defendant's guilty plea to the crime of "conspiracy to commit attempted murder." (*Id.* at pp. 79, 81.)

Reviewing the entirety of the charge, in light of the evidence presented at trial, we do not believe the trial court's instruction was erroneous. While one could argue that the instruction would have been more precise had it instructed the jury that the object of the conspiracy was *murder*, rather than *attempted murder* (as presumably the conspirators intended to succeed), "the meaning that the instructions *communicated to the jury*" was clear and unobjectionable. (*Benson*, *supra*, 52 Cal.3d at p. 801.) If the jurors found that Brittain conspired with Phillips to shoot Hirt, he could be deemed liable for attempted murder even though Brittain did not himself pull the trigger.

Further, unlike *Iniguez*, *supra*, 96 Cal.App.4th 75, the case relied on by Brittain, the result of the instruction was not that Brittain was found guilty of a nonexistent crime — conspiracy to commit attempted murder. Rather, Brittain was found guilty of a very real crime — attempted murder — through (at least potentially) the application of conspiracy principles.

In sum, the jury was properly informed that Brittain could be found guilty of attempted murder if the attempted murder resulted from a conspiracy between Brittain and Phillips. There is nothing improper about such an instruction or "the meaning that the instructions *communicated to the jury*" (*Benson*, *supra*, 52 Cal.3d at p. 801) and, consequently, Brittain's contention that its provision to the jury warrants reversal is without merit. (See *State v. Jackson* (Wis.App. 2005) 701 N.W.2d 42, 47 [distinguishing *Iniguez* in holding that trial court did not err in instructing the jury on potential criminal liability as a conspirator in an attempted armed robbery].)

C. *The Trial Court's Failure to Sever the Codefendants' Cases Does Not Warrant Reversal.*

Brittain contends that the trial court violated his constitutional rights by allowing him to be tried jointly with Phillips. Specifically, he argues, the trial court's failure to sever the defendants' cases was improper because it resulted in the admission of Phillips's prejudicial out-of-court statements that would otherwise have been inadmissible in Brittain's trial.

Prior to addressing this contention, we first set forth the procedural history as it relates to the severance issue, as well as the statements admitted in the joint trial that Brittain relies on for his claim that severance was required.

1. *Procedural History/Phillips's Statements*

Prior to trial, both defendants requested that they be tried separately. The trial court held a hearing on the requests at which it indicated that it did not believe there was any evidence highlighted by the defense or prosecution that would warrant separate trials. The court noted, however, that if there were statements that were admissible only against one of the defendants and it was not possible to redact the statements to comply with the requirements of *Aranda/Bruton*,[5] "that could cause a granting of a motion to sever defendants." Consistent with this statement, the trial court later ruled that if the prosecution intended to introduce statements made by Phillips to police, severance would be required. The prosecutor elected not to introduce Phillips's statements to police. The

---

5 See *Bruton v. United States* (1968) 391 U.S. 123, 126-137 (*Bruton*); *People v. Aranda* (1965) 63 Cal.2d 518, 528-530 (*Aranda*).

prosecutor did, however, introduce a series of out-of-court statements Phillips made to acquaintances that incriminated both Brittain and Phillips. The trial court ruled that the admission of these statements did not require severance because they were nontestimonial[6] statements against penal interest, admissible under state law and the federal Constitution against both codefendants.

Among the out-of-court statements introduced in the joint trial were Phillips's statements to Joshua Odom, an acquaintance of Phillips. Phillips told Odom that Phillips shot Deborah Hirt, and that Phillips went to rob someone, tied him in a chair with duct tape, and beat him until he grew tired and his hands hurt. These statements did not reference Brittain.

The prosecution also introduced the testimony of prison inmate Griffin. Griffin testified to statements made by Brittain and Phillips on separate occasions when Griffin was placed in a cell with each of them. Griffin testified that Phillips told him "he had committed a murder; they had killed an older guy, and that they had shot a lady in the

---

6 See *People v. Garcia* (2008) 168 Cal.App.4th 261, 291 (explaining that testimonial statements are "'statements, made with some formality, which, *viewed objectively*, are for the *primary purpose* of establishing and proving facts for possible use in a criminal trial'"; "[a]n 'informal statement made in an unstructured setting' generally does not constitute a testimonial statement"); *People v. Cervantes* (2004) 118 Cal.App.4th 162, 173 (*Cervantes*) (recognizing same distinction); see generally *Crawford v. Washington* (2004) 541 U.S. 36.

back of the head." Phillipps purportedly told Griffin that he had committed the crimes "with three other people."[7]

Ramirez also testified about conversations she had with Phillips. She stated that Phillips would work on cars and when he was not immediately paid for the work, would later collect the money. Brittain would accompany Phillips in the collection efforts. She recalled one instance where Phillips said that he and Brittain went to collect money and "something went bad." Ramirez could not recall if the conversation "actually happened with me, [Phillips] and [Brittain]." She thought it was "probably both" Phillips and Brittain who told her that they would collect money.

2. *Analysis*

Brittain contends that his convictions must be reversed because as a result of the joint trial, "the trial court allowed admission into evidence of statements made by codefendant Phillips which violated [Brittain's] Sixth Amendment right to confront witnesses." We disagree.

The Sixth Amendment to the federal Constitution guarantees a criminal defendant's right to confront the witnesses against him. It has long been recognized that this right is implicated when a statement, admissible against only one of multiple

---

7 In his brief, Brittain states that Griffin testified that when Phillips used the word, "we" in reference to the crimes, Phillips meant Phillips and Brittain. In fact, however, Griffin's testimony does not include such a statement. Rather, in the portion of the transcript cited by Brittain, Griffin acknowledged that *Brittain* referred to Phillips as his "accomplice." Thus, it was Brittain's statements, not Phillips's statements, that supported the inference that Phillips was referring to Brittain.

codefendants (see, e.g., Evid. Code, § 1220 [party admission]) is introduced in a joint trial and the declarant declines to testify. As explained in *Bruton*, *supra*, 391 U.S. at pages 126-137, and *Aranda*, *supra*, 63 Cal.2d at pages 528-530, the prosecution is consequently prohibited from introducing certain codefendant statements in a joint trial, even if the jury is instructed that the evidence is admissible against only one of the codefendants. The rationale for these decisions is that "it may be psychologically impossible for jurors to put the confession [of one defendant] out of their minds when determining the guilt of the [other]." (*People v. Fletcher* (1996) 13 Cal.4th 451, 455 (*Fletcher*).)

The *Aranda/Bruton* prohibition does not apply to every statement of a codefendant introduced in a joint trial, but "only to confessions that are not only 'powerfully incriminating' but also 'facially incriminating' of the nondeclarant defendant." (*Fletcher*, *supra*, 13 Cal.4th at p. 455; see also *Richardson v. Marsh* (1987) 481 U.S. 200, 207-208.) Thus, a defendant's out-of-court confession may be redacted to eliminate any reference to the codefendant to avoid a Sixth Amendment confrontation problem. (*Richardson*, at pp. 207-208; *Fletcher*, at pp. 455-456.) In addition, when a codefendant's statement is admissible against all defendants, the *Aranda/Bruton* prohibition has no application. (*Cervantes*, *supra*, 118 Cal.App.4th at p. 177; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 330-331 (*Greenberger*); see also *U.S. v. Mussare* (3d Cir. 2005) 405 F.3d 161, 168 (*Mussare*).)

In the instant case, the trial court ruled that Phillips's statements to third parties incriminating Brittain did not implicate *Aranda/Bruton* because they were declarations

against penal interest (see Evid. Code, § 1230) and thus admissible against *both* defendants under state and federal law. Brittain disagrees with this ruling, contending that because the out-of-court statements not only implicated the speaker's (Phillips's) penal interest but "also implicated" Brittain, they were "inherently untrustworthy and presumptively unreliable," and thus inadmissible as statements against penal interest and under *Aranda/Bruton*. Brittain's analysis is incorrect. (See *Greenberger*, *supra*, 58 Cal.App.4th at p. 332 ["*Bruton* does not stand for the proposition that all statements of one defendant that implicate another may not be introduced against all defendants in a joint trial"].)

We recognize that only "'specifically disserving'" portions of an out-of-court statement are admissible as statements against penal interest. (*People v. Duarte* (2000) 24 Cal.4th 603, 612.) Consequently, a hearsay statement "'which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others)'" must either be redacted to eliminate self-serving or blame-shifting portions or excluded entirely. (*Ibid.*)

A statement can, however, both incriminate others and be "specifically disserving" to the declarant's penal interest. Such a statement is admissible in a joint trial in its entirety as a statement against penal interest. (*Greenberger*, *supra*, 58 Cal.App.4th at p. 335 ["This is not to say that a statement that incriminates the declarant and also inculpates the nondeclarant cannot be specifically disserving of the declarant's penal interest"]; *People v. Smith* (2005) 135 Cal.App.4th 914, 922 ["if the statement is *admissible* against the codefendant under a hearsay exception, and its admission

otherwise survives confrontation analysis, then the jury may consider it against the codefendant; no reason exists for severance or redaction"]; cf. *Williamson v. United States* (1994) 512 U.S. 594, 603 ["Even the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor"].)

To the extent Phillips's out-of-court statements implicated Brittain in the charged crimes, they fell comfortably within the declaration against penal interest exception to the hearsay rule. Phillips's inculpatory statements, made to acquaintances or prison inmates, did not suggest any attempt to curry favor with authorities or shift blame and bore typical indicia of reliability. (*Greenberger*, *supra*, 58 Cal.App.4th at p. 335 ["the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures"].) In the statements at issue, Phillips squarely took the blame for the criminal activities he described, merely acknowledging, at times, Brittain's cooperation in the criminal endeavor.

The complained-of statements are indistinguishable from those admitted in *Greenberger*, where there did "not appear to be any role shifting or effort to minimize [the declarant's] involvement" in the crime (*Greenberger*, *supra*, 58 Cal.App.4th at p. 341), as well as those admitted in *Cervantes*, *supra*, 118 Cal.App.4th 162, where the declarant's statements "did attribute blame to [the other codefendants] but accepted for himself an active role in the crimes." (*Id.* at p. 175.) In both cases, the appellate court held that no Sixth Amendment violation arose from the introduction of the unredacted statements in a joint trial.

We agree with the reasoning in *Cervantes* and *Greenberger* and conclude that because Phillips's out-of-court statements incriminating both Brittain and Phillips in the offenses constituted statements against penal interest, their admission in Brittain's trial did not violate the Sixth Amendment. (See *Cervantes, supra,* 118 Cal.App.4th at p. 175; *Greenberger, supra,* 58 Cal.App.4th at pp. 341-342; see also *United States v. Williams* (2d Cir. 2007) 506 F.3d 151, 157 [rejecting contention that admission of codefendant's statements to acquaintance that incriminated both defendants as statements against penal interest violated Sixth Amendment]; *Mussare, supra,* 405 F.3d at p. 168 [same].) Because the statements would have been admissible in separate trials, their admission did not warrant severance of the codefendants' trials or result in a deprivation of due process. Consequently, Brittain's argument that severance was mandated is without merit.

D. *The Trial Court Did Not Err in Declining to Sua Sponte Instruct that Phillips's Statements Should Be Viewed with Caution*

Brittain further contends that even if Phillips's out-of-court statements were properly admitted in the joint trial, the trial court erred in failing to sua sponte instruct the jury that those statements must be viewed with caution.

The facts at trial made clear that Phillips was Brittain's accomplice. (See § 1111 [defining an accomplice under California law].) "[A]n accomplice has a natural incentive to minimize his own guilt before the jury and to enlarge that of his cohorts . . . ." (*People v. Brown* (2003) 31 Cal.4th 518, 555 (*Brown*).) Consequently, as a general matter, when the testimony or statement of an accomplice is part of the prosecution's case, the trial

court is required to sua sponte inform the jury that the statement must "be viewed with caution to the extent it incriminates others." (*Ibid.*)

As explained in *Brown*, however, this requirement does not apply where, as here, the accomplice's statements bear sufficient indicia of reliability to permit admission under the statements against the penal interest exception to the hearsay rule. (See Evid. Code, § 1230.) In *Brown*, our Supreme Court held that a cautionary instruction regarding accomplice statements is only warranted when the out-of-court statements "'"are made under suspect circumstances,"'" such as "'"when the accomplice has been arrested or is questioned by the police."'" (*Brown*, *supra*, 31 Cal.4th at p. 555.) (As noted earlier, the trial court excluded Phillips's incriminatory statements to the police.) When, however, the out-of-court statements are "sufficiently trustworthy to permit their admission into evidence despite the hearsay rule" — such as under the exception for statements against penal interest — a cautionary instruction is not required. (*Id*. at p. 556; see also *People v. Williams* (1997) 16 Cal.4th 635, 682 [instructional duty not triggered where accomplice statements "made in the course of and in furtherance of the conspiracy were not made under suspect circumstances and therefore were sufficiently reliable to require no corroboration"].) This is exactly what occurred in the instant case.

Brittain makes no attempt to distinguish *Brown*, which is binding authority on this court.[8] Indeed, we can see no reason that the principle announced in *Brown* would not

---

8 The Attorney General relies prominently on *Brown*, *supra*, 31 Cal.4th 518, in arguing that no instruction was required. Brittain ignores the case completely in his reply brief, citing instead earlier and more general discussions of the accomplice testimony

control in the circumstances of the instant case, where the accomplice statements were properly admitted as statements against penal interest and no cautionary instruction was required. (*Brown, supra*, 31 Cal.4th at pp. 555-556.) Consequently, we reject Brittain's contention that the trial court erred in omitting a cautionary instruction.

E. *Brittain Forfeited Any Claim to Reversal Based on the Erroneous Admission of Assertedly Prejudicial Evidence and, in Any Event, the Evidence Is Not Sufficiently Prejudicial to Warrant Reversal*

Brittain's last contention is that his convictions must be reversed due to the admission of various items of prejudicial and irrelevant evidence. Specifically, Brittain points to the admission of evidence that: (i) he told another inmate he was happy to avoid the death penalty; (ii) he told his sister he wanted a television in state prison; and (iii) that Ramirez's mother lost her home after she used it to bail Brittain out of jail. We address this contention after summarizing the specific evidence that Brittain complains of on appeal.

1. *The Evidence Challenged on Appeal*

(a) *Avoiding the Death Penalty*

Griffin testified about a conversation he had with Brittain while they were both in jail. During that testimony, Griffin stated, without objection, that after Brittain talked to

---

rules that have little bearing on the present issue. (See *People v. Guiuan* (1998) 18 Cal.4th 558, 565 [stating general rule and rejecting contention that trial court erred]; *People v. Williams* (1988) 45 Cal.3d 1268, 1314 [holding trial court erred in not targeting instruction to accomplice testimony favorable to prosecution, but concluding that error was harmless].)

his attorney, Brittain said he was excited that the prosecution was not "going to seek the death penalty."

(b) *A Television in the SHU*

The prosecution introduced a tape recording of a phone call Brittain made from jail to his sister. In the call, Brittain states that he would like his sister to sell some of his baseball cards so that he will be able to purchase a television for use in the SHU. Brittain adds that he will be in the SHU for "who knows how long." After the trial court precluded the prosecution from introducing testimony that the SHU was reserved for high-risk inmates convicted of violent crimes, an officer testified that "SHU" meant segregated housing unit. Prior to the introduction of the testimony regarding the television, Brittain's counsel stated he would "incorporate, by reference, the objections previously made as it relates to this portion of the telephone call."[9] The court overruled the objection.

(c) *The Bail Forfeiture*

Ramirez's testimony was read to the jury. In that testimony, Ramirez related how Brittain, after seeing a segment on *Crime Stoppers*, decided to flee. Ramirez noted that in the course of fleeing, Brittain failed to attend a court appearance and that Ramirez's

---

9 The transcript of the proceedings does not reflect any specific objection raised by Brittain's counsel to the phone call described above, although the court does, at one point, reference an off-the-record conversation regarding the phone calls. (The parties on appeal do not offer any explanation of the intended objection.) The voluminous record reflects numerous conversations between counsel and the court regarding the prosecutor's attempt to introduce various phone calls made by Brittain while in jail. The trial court excluded the bulk of the evidence, but did allow the testimony described above.

mother "lost her property because of that," as she had previously "put up property for [Brittain] to get out" on bail. Another witness (Brittain's mother) also testified that Brittain "skipped town" after Ramirez's mother posted bail. The parties stipulated that Brittain was released from custody on bond on August 1, 2004, and failed to appear in court on August 5.

2. *Analysis*

Brittain contends that the evidence summarized above was "completely and utterly irrelevant to the issues before the jury." Brittain also argues the evidence should have been excluded under Evidence Code section 352.[10]

---

10 Brittain adds that Ramirez's testimony regarding her mother's lost property was false and its admission violated the principle that the state may not knowingly use false or misleading testimony to obtain a conviction. (See *People v. Morrison* (2004) 34 Cal.4th 698, 716 [recognizing that prosecutor "'cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents'"].)

As Brittain notes, the prosecutor informed the court and counsel, prior to the reading of Ramirez's testimony to the jury, that Ramirez recently told the prosecutor that while she had feared her mother would lose her home due to Brittain's failure to appear in court, in fact, "to [Ramirez's] knowledge, [her mother] did not lose her house." Neither Brittain's nor Phillips's counsel requested any relief based on that disclosure. Later, when the trial court reviewed Ramirez's preliminary hearing transcript line-by-line with counsel to determine its admissibility, counsel did not suggest that the testimony regarding Ramirez's mother's "property" should be excluded on the basis that it was false or misleading. Given the absence of objection, even if Brittain were correct that the testimony should not have been introduced (or should have been redacted in some manner), his failure to object at trial forfeited the claim. (*People v. Harrison* (2005) 35 Cal.4th 208, 241-242 (*Harrison*) [holding in analyzing analogous circumstance of purportedly false prosecution testimony that the defendant "failed to preserve this issue for appeal because he did not object to that testimony at trial"].)

In addition, while it may have been preferable to redact the testimony in light of the prosecutor's revelation, we believe the prosecutor fulfilled her ethical obligation by disclosing the information that called the preliminary hearing testimony into question to the court and defense counsel. (See *Harrison*, *supra*, 35 Cal.4th at p. 242 ["When . . .

We first reject Brittain's contention because of his failure to preserve these objections in the trial court. With respect to the bulk of the evidence now challenged on appeal, neither Brittain nor Phillips made any cognizable objection in the trial court. (Evid. Code, § 353, subd. (a) [precluding reversal of a jury verdict on the basis of "the erroneous admission of evidence" unless "[t]here appears of record an objection to . . . the evidence that was timely made and so stated as to make clear the specific ground of the objection"].) To the extent any objection was made to the evidence, a specific objection on the grounds now specified do not appear "of record." (*Ibid.*; *People v. Partida* (2005) 37 Cal.4th 428, 435 [on appeal, defendant "may not argue that the court should have excluded the evidence for a reason different from his trial objection"].) Consequently, the challenge to the admission of the evidence summarized above is forfeited on appeal. (Evid. Code, § 353; *Partida*, at p. 435; cf. *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1227-1228 [defendant bears the burden of demonstrating reversible error in admission of evidence].)[11]

---

the prosecution has doubts as to the truth of a statement it intends to present at trial, it must disclose to the defense any material evidence suggesting that the statement in question is false"].)

11 Brittain argues in his reply brief that "[t]he record shows no '*intelligent*' waiver or forfeiture" (italics added) and, consequently, that any such forfeiture requires a conclusion that trial counsel was constitutionally deficient. We disagree. "A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless

In addition, even if the challenge is not forfeited, it would not warrant reversal. To demonstrate prejudice sufficient for reversal on the ground of evidentiary error, the defendant must show a reasonable probability that absent the trial court's erroneous ruling, the result of the proceeding would have been different. (*People v. Alcala* (1992) 4 Cal.4th 742, 791 [evidentiary rulings reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) reasonable probability standard]; see also *People v. Lucas* (1995) 12 Cal.4th 415, 436 [to succeed on a claim of ineffective assistance of counsel, defendant must demonstrate a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'"].)[12] Here there has been no such showing.

The evidence that Brittain was pleased he did not face the death penalty and would need a television to help pass the time in prison reflected a typical mindset for a person

---

counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation." (*Ibid.*)

Here, the appellate record sheds no light on the motivation for trial counsel's allegedly erroneous omissions. Perhaps counsel felt the evidence was not objectionable, created little prejudice in the context of the overall case, or viewed the evidence as beneficial to the defense (humanizing Brittain in a way that was otherwise absent from the presentation to the jury). The presence of these potential tactical grounds for failing to object require us to reject the suggestion that reversal would be warranted despite the absence of objection. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1121.)

12 Brittain appears to acknowledge that the *Watson* standard is the applicable standard for determining whether there was sufficient prejudice for reversal on this ground. To the extent he is also contending that the evidentiary error amounted to a violation of his federal constitutional rights, thus warranting a more stringent standard of harmless error review, we reject that contention. (See *People v. Gurule* (2002) 28 Cal.4th 557, 620 [rejecting contention that "routine evidentiary rulings" complained of on appeal "rise to the level of a constitutional violation"].)

charged with murder (guilty or innocent) and thus had virtually no potential to change the outcome of the proceeding. As for the other evidence complained of, while the jurors might have thought poorly of Brittain's placing Ramirez's mother's "property" in jeopardy by absconding, it is highly implausible — given the gravity of the charges — that the jurors would have relied on that relatively minor transgression to convict Brittain of the grave offenses at issue in this case.

In sum, Brittain's challenge to the various items of admitted testimony summarized at the outset of this section fails for two separate reasons. First, Brittain forfeited his challenge by failing to object in the trial court on the grounds now raised on appeal. Second, even if Brittain had preserved this contention (or if we deem the objection cognizable due to the assertedly deficient performance of counsel) and we were to find the trial court's admission of the evidence erroneous, the challenge would still fail due to the absence of demonstrated prejudice. The evidence complained of was tangential to the core issues in the trial and unlikely to inflame the prejudices of the jury. Thus there is no reasonable probability that its exclusion would have altered the jury's verdict.[13]

---

13 Brittain also contends that the cumulative impact of the various errors alleged, even if independently insufficient to warrant reversal, violated his right to a fair trial. As we have not found any error and deem the only arguable error insufficiently prejudicial to warrant reversal, we reject this contention.

II.

Phillips's Appeal

In addition to joining in Brittain's contentions, Phillips raises two separate challenges on appeal. We address each separately below.

A. *The Trial Court's Failure to Sever the Offenses Does Not Warrant Reversal*

Phillips argues that the trial court abused its discretion and violated his constitutional rights by permitting the prosecution to try the counts relating to the attempted murder of Hirt in the same proceeding as those related to the murder of Abramovitz.

The prosecution may conduct a consolidated trial of discrete criminal offenses where defendants are accused of "two or more different offenses of the same class of crimes or offenses"; however, the trial court may, "in the interests of justice and for good cause shown," order that "the different offenses or counts set forth in the accusatory pleading be tried separately." (§ 954.)[14] The trial court's denial of a severance request is reviewed for abuse of discretion. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1128 (*Zambrano*).) "Where the statutory requirements for joinder are met, the defendant must make a clear showing of prejudice to demonstrate that the trial court abused its

14 Phillips does not dispute that murder and attempted murder are crimes of the "same class." (§ 954.)

discretion." (*Ibid.*) Consolidation of charges "ordinarily promotes efficiency" and, consequently, "the law prefers it." (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.)[15]

Our Supreme Court has identified the following factors to be considered in assessing the potential prejudice from consolidation: "whether (1) the evidence would be cross-admissible in separate trials, (2) some charges are unusually likely to inflame the jury against the defendant, (3) a weak case has been joined with a strong case, or with another weak case, so that the total evidence may unfairly alter the outcome on some or all charges, and (4) one of the charges is a capital offense, or joinder of the charges converts the matter into a capital case." (*Zambrano, supra*, 41 Cal.4th at pp. 1128-1129.) "Cross-admissibility ordinarily dispels any inference of prejudice," and it is generally "enough that the" evidence in one case is "admissible in the [other] case; 'two-way' cross-admissibility is not required." (*Id.* at p. 1129.) Nevertheless, "cross-admissibility is not the sine qua non of joint trials" and "[w]hether charged counts are cross-admissible in separate trials is only one of the factors to be considered in determining whether potential

---

15 Contrary to Phillips's contention, the challenges to joinder raised in this appeal implicate judicial efficiency concerns. As explained in *People v. Bean* (1988) 46 Cal.3d 919, 939-940, "[a] unitary trial requires a single courtroom, judge, and court attachés[;]" "[o]nly one group of jurors need serve[;] and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried." "In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process." (*Id.* at p. 940.) Indeed, taking Brittain's contention that severance of defendants was required with Phillips's contention that severance of charges was required (with each appellant joining in the other's contentions), the appellants contend that the trial court was required to conduct *four* separate trials of the instant offenses, rather than a single, joint trial.

prejudice requires severance . . . ." (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 641 (*Frank*).)

Phillips's primary contention is that severance was required because the evidence supporting the two sets of charges was not cross-admissible, i.e., in separate trials the jury considering the evidence in the Hirt shooting would not have been presented with the evidence in the Abramovitz murder and vice versa. He argues this is the case because the only purpose of introducing the evidence of both offenses in separate criminal trials would be to show a criminal propensity. We disagree.

Evidence of criminal acts other than those that form the basis of the charges being tried is ordinarily inadmissible to show a criminal propensity. (Evid. Code, § 1101, subd. (a).) This prohibition does not apply, however, to evidence "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than [the defendant's] disposition to commit such an act." (Evid. Code, § 1101, subd. (b).)

In the instant case, at a minimum, the evidence of Brittain and Phillips's participation in the Abramovitz murder would have been admissible in a separate trial of the Hirt shooting to demonstrate that Brittain and Phillips were involved in an ongoing criminal partnership, a variant of *modus operandi*.

The evidence that Brittain and Phillips worked together to commit both the Abramovitz and Hirt crimes tied the offenses together and supported a logical inference that if they were guilty of one crime, they likely possessed a shared criminal intent in committing the other. As our Supreme Court has recognized, the presence of the same

confederate in the perpetration of two offenses constitutes a "highly distinctive common mark." (*People v. Cavanaugh* (1968) 69 Cal.2d 262, 273.) This characteristic can distinguish a small subset of crimes from others of the same general variety and permit admissibility of other crimes evidence for a nonpropensity purpose. (*Ibid.* [recognizing as a "highly distinctive common mark, i.e., the presence of Joseph Ponte as defendant's confederate in the commission of both the charged and uncharged offenses"]; *People v. Haston* (1968) 69 Cal.2d 233, 249-250 [emphasizing that the involvement of a specific person in prior offenses increased probative value of evidence that the person was the defendant's "crime partner"]; *People v. Floyd* (1970) 1 Cal.3d 694, 717, fn. 10 [noting that "in *Haston* . . . one significant common mark . . . was the presence of the same person as one of the perpetrators of both the charged and uncharged offenses"]; *People v. Crawford* (1969) 273 Cal.App.2d 868, 874 [recognizing that *Haston* and *Cavanaugh* "hold that since the identity of the same confederates was established in the commission of both the charged and uncharged offenses, there was then a 'highly distinctive common mark' which, when considered in combination with other common marks, provided a sufficient basis for the admissibility of evidence of other crimes"].)

Here, if the jury believed that Brittain and Phillips worked in tandem to commit the Abramovitz offense, that conclusion supported an inference that they did so again in the Hirt offense and vice versa. Indeed, this inference responds directly to one of the contentions Brittain raises on appeal — that there was insufficient evidence to support the jury's conclusion that Brittain shared Phillips's criminal intent in shooting Hirt. (See part I.A., *ante*.)

As the evidence of the separate offenses was admissible for a nonpropensity purpose, there was, contrary to Phillips's contention, cross-admissibility. As noted earlier, cross-admissibility is a strong factor in demonstrating that joinder was proper. (*Zambrano*, *supra*, 41 Cal.4th at p. 1129 [recognizing that "[c]ross-admissibility ordinarily dispels any inference of prejudice" from joinder].)

Apart from cross-admissibility, Phillips does not argue that any of the other factors generally emphasized by our Supreme Court in this context favored separate trials. Instead, he relies on *Williams v. Superior Court* (1984) 36 Cal.3d 441, which recognized another concern: "the danger that the jury here would aggregate all of the evidence, though presented separately in relation to each charge, and convict on both charges in a joint trial; whereas, at least arguably, in separate trials, there might not be convictions on both charges." (*Id.* at p. 453.) We do not believe, however, that this language from *Williams* alters the analysis. First, as we have discussed, evidence of the separate criminal offenses was cross-admissible, so the concern in *Williams* of a different result in separate trials is largely absent. Second, we can see no reason, on the facts of this case, that the jury would have been unable to make a discrete determination as to the defendants' respective guilt in each incident. Consequently, Phillips's argument that the jury likely returned convictions on each offense based on an agglomeration of the cumulative evidence is sheer speculation.

Phillips argues that "[t]he present case is very similar to *Bean v. Calderon* [(9th Cir. 1998) 163 F.3d 1073]" where a split Ninth Circuit panel reversed on habeas corpus a California conviction based on the joinder of two distinct crimes in a single trial.

Phillips's argument is a double-edged sword. As the Ninth Circuit's opinion recognizes, its ruling was at odds with the California Supreme Court's decision *on the facts of the same case* holding that joinder was not improper. (See *People v. Bean*, *supra*, 46 Cal.3d at p. 940.) It is, of course, the California case, not the Ninth Circuit opinion, that is binding authority in this court. (See *id.* at p. 939 [holding that joinder was not required even though evidence of two sets of offenses was not cross-admissible because the evidence of the two crimes was of relatively equal strength, "neither offense was particularly inflammatory in comparison with the other," and "[t]here was substantial evidence of defendant's involvement in each"]; see also *People v. Soper* (2009) ___ Cal.4th ___ [2009 Cal. Lexis 1100] [relying on *Bean*, *supra*, 46 Cal.3d 919, to conclude that severance was not improper].)

In addition, *Bean v. Calderon*, *supra*, 163 F.3d 1073, is easily distinguished. The Ninth Circuit reversed the conviction in that case because the evidence of the separate crimes was not cross-admissible, and resulted in the consolidation of one "relatively weak" case with a "compelling" one. (*Id.* at p. 1083.) Here, as we have explained, there was cross-admissibility *and* the evidence of guilt of both sets of charges was of relatively equal strength. (See also *Frank*, *supra*, 48 Cal.3d at p. 641 [holding that there was no showing of improper joinder where "[t]he offenses appear to be of relatively equal strength," and "neither offense is particularly inflammatory in comparison with the other"]; *People v. Hill* (1995) 34 Cal.App.4th 727, 735-736 [same].) Thus, the concerns emphasized in *Bean v. Calderon*, *supra*, 163 F.3d 1073, are absent here and joinder was

permissible under both the Ninth Circuit and our Supreme Court's analysis in *People v. Bean*, *supra*, 46 Cal.3d 919.[16]

B. *The Trial Court's Exclusion of Impeachment Does Not Warrant Reversal*

Phillips argues that the trial court abused its discretion in excluding out-of-court statements made by Odom and Ramirez that were inconsistent with statements placed before the jury by the prosecution. Prior to addressing this contention we set forth the applicable procedural background.

1. *Procedural Background*

The prosecution introduced the preliminary hearing testimony of Ramirez and Odom after Ramirez and Odom were deemed unavailable for trial. (See Evid. Code, § 1291.) The prosecution also presented, as inconsistent statements, additional statements made by Ramirez and Odom to law enforcement officers that implicated Brittain and Phillips in the charged crimes. (See Evid. Code, § 770, subd. (a) [permitting admission of statement made by a witness that is inconsistent with any part of his testimony if "[t]he witness was so examined while testifying as to give him an opportunity to explain or to deny the statement"]; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1173 ["'as long as a defendant was provided the *opportunity* for cross-

---

16 Phillips also contends that because the prosecutor's closing argument suggested that the evidence of the two crimes was cross-admissible, the unitary trial violated his rights to a fair trial. As we have explained, however, the evidence was cross-admissible and, therefore, the prosecutor's argument was not objectionable. Apart from this contention, Phillips makes no other specific argument as to why the unitary trial was so prejudicial "as to render the trial grossly unfair and thus deny due process," and we are unable to discern any. (*People v. Bean, supra*, 46 Cal.3d at p. 940.)

examination, the admission of preliminary hearing testimony under Evidence Code section 1291 does not offend the confrontation clause of the federal Constitution'"].)

In light of the prosecutor's reliance on out-of-court statements by Odom and Ramirez, defense counsel argued that they should be permitted to introduce additional out-of-court statements made by Ramirez and Odom that were assertedly inconsistent with the admitted statements. In particular, Brittain's counsel presented the trial court with a "report dated May 5th, 2005," documenting an interview of Odom by a defense investigator. Counsel stated that he intended to "offer that entire report" "in compliance with [Evidence Code section] 770." The trial court excluded the report on the ground that the witness (Odom) had not been given an opportunity under Evidence Code section 770 to "refute or be presented with those statements" at the preliminary hearing.

The May 5 report, labeled "Court's Ex. 5" (hereafter, court's exhibit 5) in the trial court proceedings,[17] consists of a written summary of an interview by Jon Lane with Odom at the San Diego County Sheriff's Department, Descanso Detention Facility. The summary relates Odom's statement that he was present, along with Brittain and Phillips, during the Hirt shooting and indicates that Phillips was the shooter. Odom also communicated to the investigator that Phillips told Odom about the Abramovitz murder,

---

17 On our own motion, we take judicial notice of court's exhibit 5, which is part of the trial record in this case. (See Evid. Code, §§ 452, subd. (d), 459, subd. (a).) Its absence from the appellate record is baffling in light of the arguments of both parties. In essence, Phillips's brief asserts that the document was crucial to a fair trial and the Attorney General responds that the document was inconsequential. Neither party's brief, however, exhibits any familiarity with the content of the document, and neither party appears to have thought it necessary to submit the document to this court.

admitting to beating Abramovitz "until his hands hurt"; according to the report, Odom believed Phillips because Phillips's "hands were red and swollen."

With respect to Ramirez, the record shows that the purportedly inconsistent statements that were excluded (statements apparently redacted out of a prosecution exhibit) included Ramirez's statements to a Colorado police officer (i) that Brittain and Phillips had Abramovitz's identification "because in order to get gas . . . you need the zip code of the person"; (ii) "We did try to get gas with it"; and (iii) "If there was a gun, I never knew about it."[18]

2. *Analysis*

Phillips contends that the trial court's exclusion of potential impeachment of Ramirez and Odom was erroneous and that the exclusion was prejudicial because "[t]he inconsistent hearsay statements provided a critical alternative method for the jury to determine [Odom's and Ramirez's] credibility in the absence of their presence as . . . live witnesses at trial."

Phillips is correct, and the Attorney General appears to concede, that inconsistent statements made by Odom and Ramirez were admissible under Evidence Code section 1202, and thus the exclusion of the statements (as impeachment) was error. (See *People v. Corella* (2004) 122 Cal.App.4th 461, 470 (*Corella*) [recognizing that "when a hearsay statement by a declarant who is not a witness is admitted into evidence by the

---

[18] The parties have failed to identify any other statements that were excluded, and we have been unable to discern the content of any such statements from the record.

prosecution, an inconsistent hearsay statement by the same person offered by the defense is admissible to attack the declarant's credibility," and this rule applies "'whether or not the declarant has been given an opportunity to explain or deny the inconsistency'"].) The record, however, does not support a conclusion that the error in excluding impeachment was sufficiently prejudicial to warrant reversal.

An appellate court may not set aside a jury's verdict on the ground of the erroneous exclusion of evidence unless the record shows that, absent the error, there is a reasonable probability that the verdict would have been different. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 999 (*Cunningham*) [holding that error in the exclusion of defense evidence "on a minor or subsidiary point" as opposed to "the complete exclusion of evidence intended to establish an accused's defense" is subject to review under *Watson* standard]; Cal. Const., art. VI, § 13 ["No judgment shall be set aside . . . on the ground of . . . the improper admission or rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"]; Evid. Code, § 354 ["A verdict . . . shall not be set aside . . . by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error . . . is of the opinion that the error . . . complained of resulted in a miscarriage of justice"].)

The record in the instant case does not indicate any probability that the exclusion of the impeachment influenced the verdict.

At the outset, we note that Phillips's appellate argument is procedurally inadequate to demonstrate reversible error. Phillips fails to identify any specific excluded statement

that he believes would have altered the jury's perception of Ramirez or Odom. Instead, Phillips asserts generally that because Odom's and Ramirez's testimony included "some of the most damaging" evidence against Phillips, the trial court's exclusion of "inconsistent statements by Odom and Ramirez" — whatever they may have been — must have influenced the jury's verdict. This argument is too general and speculative to support reversal on appeal. (See *People v. Williams*, *supra*, 16 Cal.4th at p. 206 [contentions "'perfunctorily asserted without argument in support'" are not properly before appellate court]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [it is "not [the] role" of a reviewing court to "construct a theory" of relief for an appellant, but rather to evaluate "'legal argument with citation of authorities on the points made'"]; *People v. Schenk* (1937) 19 Cal.App.2d 503, 505 ["It is elementary that an appellate court will not search for error in order to reverse a judgment of a trial court, and that, unless the appellant shows prejudicial error, the judgment must be affirmed"].)

In his reply brief, Phillips (through counsel) appears to defend his lack of specificity on the ground that the excluded statements are not in the record. Phillips then asserts that "any perceived deficiency in the record is the direct result of the trial court's erroneous ruling *excluding* the evidence." This assertion is, to put it mildly, odd. It is clear from the record that all trial counsel (and the trial court) had in their possession documents containing the excluded statements. We cannot conceive of anything that would have prevented the inclusion of these documents (had they been favorable to the appellants' position) in the trial or appellate record.

We independently reviewed the trial court file and court's exhibit 5. As our earlier summary of the contents of that document indicates, the document refutes rather than supports Phillips's prejudice argument. Court's exhibit 5, while perhaps including some minor inconsistencies with the prosecution evidence, strongly supports the prosecution's case on the key points — that Phillips (with the active cooperation of Brittain) shot Hirt and beat Abramovitz to death. Consequently, it is inconceivable that the document's admission into evidence would have altered the jury's verdict.

Similarly, to the extent the record elucidates the content of the excluded statements of Ramirez, those statements are again consistent with the prosecution's case — indicating that Brittain and Phillips attempted to purchase gas with Abramovitz's ATM card. The other statement that Ramirez claims not to have know about "a gun" does little to impeach her testimony.

Thus, our independent review of the record does not support a finding that the trial court's error was prejudicial. Instead, it indicates that the excluded evidence was consistent with the prosecution's theory of the case with respect to Brittain's and Phillips's participation in the charged crimes. Consequently, we fail to see, and Phillips does not explain, how we could conclude that the record shows that the exclusion of the evidence complained of was sufficiently prejudicial to warrant reversal. As a result, we must reject this challenge. (*Cunningham*, *supra*, 25 Cal.4th at p. 999; Cal. Const., art. VI, § 13; Evid. Code, § 354.)

DISPOSITION

Affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.